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STATE FOR EB/TPP/IPE - JBBGER  
STATE PLEASE PASS TO USTR FOR MOLNAR/CHOE-GROVES

USDOC FOR ITA/MAC/OIPR - CPETERS  
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B) KYIV 348  
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¶1. (SBU) Summary and Recommendation: Embassy recommends Ukraine remain on the Special 301 Priority Watch List, which is statutorily accompanied by Section 306 monitoring (Ref A), although the Government of Ukraine is definitely moving in the right direction on IPR protection. The GOU has followed up on the substantial progress made in 2005, which led to the lifting of Special 301 sanctions and restoration of GSP benefits. Ukraine is no longer a major source of pirated goods, although such goods do remain readily available on the local market. Ukraine has made important strides in bringing its legislation in line with TRIPS and international obligations, notably in the area of data protection. The GOU significantly stepped up enforcement efforts in 2006, although internet piracy is a looming challenge. Government procurement/use of unlicensed software remains a problem. The Petrivka open air market is Ukraine's most notorious for pirated material; GOU authorities have struggled to limit illicit sales there, but have not moved to shut down the market. Post believes enforcement-related training, especially for judges/prosecutors and officials responsible for combating internet piracy, is warranted. End Summary and Recommendation.

Overall Assessment of IP Climate  
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¶2. (SBU) Although the GOU has significantly stepped up its efforts to protect Intellectual Property Rights (IPR) in recent years, Ukraine still faces serious problems of piracy, especially the widespread sale of pirate optical disc material. Industry reps estimate piracy levels for music at 55%, for video at 76%, and for computer software

at 85%. Counterfeit goods are also widely available. Ukraine's IPR-related legal base has steadily improved and only minor adjustments are now needed to bring legislation fully in compliance with international norms and to allow for improved enforcement. Courts continue to hand down lax sentences for IPR infringers, and customs officials have thus far failed to halt the flood of pirated goods coming in from Russia.

#### Optical Media Piracy

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¶3. (U) Ukraine now has one of the most comprehensive optical media laws in the world, regulating nearly every step in the life of an optical disc (OD). The 2002 law "On the Specifics of the Government Regulation of the Activity of Subjects of Economic Activity Associated with the Manufacture, Export, and Import of Laser-Readable Discs" put into place a detailed regulatory regime. Its 10 articles outlined a special OD plant licensing regime, plant inspection procedures, and measures to be taken when violations are discovered. A package of amendments to the 2002 law and the Criminal Code of Ukraine, passed in the Rada (parliament) in July 2005, improved inspection procedures and increased the penalties that apply to violations. The amendments also removed a requirement that imported ODs have Source Identification (SID) codes imprinted on them.

¶4. (SBU) Ukraine is no longer a major source of pirated optical media. According to Vladimir Iling, head of the IFPI Kyiv office, the organization's forensic specialists have not detected any pirated discs believed to be manufactured in Ukraine since the 2005 amendments to the OD law. The State Department for Intellectual Property (SDIP) coordinates inspections of the seven OD plants operating in Ukraine, and GOU officials reported that they did not detect any signs of pirate production during their more than 20 inspections in 2006. The Ministry of Internal Affairs claims that roughly nine out of ten pirated CDs in Ukraine come from Russia. Yevgeniy Roudyk, deputy head of the Internal Affairs Ministry's IPR Department, told Econoff on February 9 that GOU investigators had uncovered major shipping routes that originate almost exclusively in Russia.

¶5. (SBU) The hologram sticker program (ref L) remains the primary method used by law enforcement to recognize potentially pirated materials. Industry reps have complained about the functioning of this program; they claim that some importers of pirated discs are able to obtain the hologram stickers, while legitimate producers have to contend with time-consuming, bureaucratic hurdles. Counterfeit hologram stickers are also a problem. Industry and GOU officials have come across several different varieties of forged stickers, some of very high quality. GOU officials, including the head of the Ministry of Internal Affairs' IPR Department Serhiy Lebid, argue, however, that eliminating the program altogether would be a mistake. Article 203 of the Criminal Code provides law enforcement officials with some "ex officio" powers when they encounter suspected pirated products without a hologram sticker. Eliminating the hologram program would therefore serve to reduce law enforcement's authority to seize suspected pirated material.

#### International Obligations and TRIPS Compliance

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¶6. (U) Ukraine is a member of the Universal Copyright Convention, the Convention establishing the World Intellectual Property Organization (WIPO), the Paris Convention, the Madrid Agreement, the Patent Cooperation Treaty, the International Convention for the Protection of New Varieties of Plants, the Berne Convention, the Geneva Phonograms Convention, the Trademark Law Treaty, and the Budapest Treaty. Ukraine is a party to the 1996 WIPO Copyright Treaty (WCT), the WIPO Performances and

Phonograms Treaty (WPPT), and the Rome Convention. Amendments to the Copyright Law passed in 2001 intended to implement the WCT and WPPT, but fell short. New amendments to the Copyright Law are needed, in particular to address technological protection measures.

¶7. (U) While working toward WTO accession, Ukraine's legal base has achieved substantial TRIPS compliance. TRIPS omnibus legislation passed in 2002 was a major step, and the Rada passed a number of IPR-related laws in November 2006. An amendment to the Customs Code granted customs officials expanded "ex officio" rights to stop pirated material from entering Ukraine and helped bring the Code into the compliance with Article 58 of the TRIPS Agreement. The Rada also passed an amendment to the law "On Protection of Rights for Indications of Origin of Goods," which sought to bring Ukraine's geographical indications (GIs) legislation into full TRIPS compliance. Further amendment to the GIs law may be necessary, however, in particular to ensure that Ukrainian law does not require GI reciprocity. Finally, the Rada passed two laws related to data protection in order to comply with Article 39.3 of TRIPS (see below).

¶8. (SBU) Ukraine's system of royalty collecting societies functions imperfectly. Rights holders have complained bitterly that some societies collect fees for public use of copyrighted material without authorization and do not properly return royalty payments to rights holders (refs C-F). SDIP's initial draft amendment to the Copyright Law failed to address industry's concerns on royalty collecting societies, but the draft is now being reworked. Legitimate rights holders have had opportunities to express their views to SDIP via the U.S.-Ukraine Enforcement Cooperation Group. SDIP's recent move to revoke the license of collecting society Oberih (ref B), now being settled in the courts, was welcomed by music industry representatives who claimed Oberih illegitimately collected fees.

#### Data Protection -----

¶9. (SBU) Ukraine has improved its protection of undisclosed test data, such as that from drug trials, from unfair commercial use (TRIPS Article 39.3). In November 2006, the Rada passed amendments to the law "On Medicinal Drugs," introducing a five-year period for the protection of undisclosed information in the course of registration of medical drugs, and to the law "On Pesticides and Agrochemicals," introducing a ten-year protection period for agricultural chemical products. The Association of Pharmaceutical Research and Development (APRaD), which unites local representatives of large international pharmaceutical companies, has said it is generally satisfied with the new law.

¶10. (U) The Ministry of Health has, on occasion, approved generic copies of pharmaceutical products under patent in other countries, allowing the copies to compete with the branded products (ref G). In one such case, the producer of the branded product successfully sued the generic producer in a Ukrainian court and got the copy pulled from the market. In another, the generic producer elected not to market the copy and so the patent holder suffered no commercial loss. APRaD has argued that the GOU should better implement patent linkage.

#### Counterfeit Goods -----

¶11. (U) Counterfeited goods, including products that contain protected trademarks, remain readily available in Ukraine. DuPont estimates that counterfeit and illegal pesticides make up 20% of Ukraine's crop protection market, causing roughly USD 40 million worth of damages to legitimate producers. Dominic Watson, DuPont Country Manager for Eastern Europe, noted on February 21 that counterfeit pesticides are particularly dangerous, as they

can hurt both crops and consumers, including foreign consumers of Ukrainian agricultural products. Monsanto, meanwhile, suffers from illegal use of its genetically-modified soybeans, present on an estimated 60% of Ukraine's soybean-growing land. In order to improve enforcement in this area, the GOU first needs to create a legal framework for the registration and use of biotechnology products. Apparel products are also a target for counterfeiters. Viktoriya Marchuk, Office Manager for Puma Ukraine, told Econoff in December 2006 that Puma was concerned by the increasing presence of counterfeited apparel in Ukraine, and was pushing the GOU to do more to stop its import. Most counterfeit goods are not produced in Ukraine, but are imported, usually from China.

#### Use/Procurement of Government Software

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¶12. (U) On March 4, 2004, the Cabinet of Ministers of Ukraine passed a resolution "On Approval of a Procedure for Software Legalization at the Executive Power Bodies," which established an inter-agency working group and procedures for phasing out illegal software at government agencies through annual inventories. The GOU signed a software legalization agreement with Microsoft Corporation in June ¶2005. However, Microsoft cancelled this agreement in June 2006, as the GOU had taken little to no action to implement it (ref H). Valeriy Lanovenko, General Manager of Microsoft Ukraine, explained that Microsoft had seen only 12% government compliance with the agreement in 2005 and an additional 3% in 2006. Lanovenko told Econoff in October 2006 that the GOU officially estimated the piracy level for government software at 78%, down only marginally from 84% in 2005. Microsoft recommends that a single government agency be named to take responsibility for the issue, and cites this problem as a major deterrent to Microsoft in considering further investment in Ukraine.

#### Enforcement

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¶13. (U) SDIP and the Ministry of Internal Affairs are steadily improving enforcement. Statistics for 2006 show a dramatic increase in IPR cases filed and in seizures. The Ministry of Internal Affairs reported that there were 812 IPR-related criminal investigations in 2006, up 68% from ¶2005. 462 cases went to the courts (up 235% from 2005) and 115 led to convictions (up 311% from 2005). Roudyk, from the Internal Affairs Ministry's IPR Department, credited the February 2006 Criminal Code amendments for the improved figures. The 2006 amendments significantly lowered the required threshold (from roughly 5,200 USD to 700 USD) needed to pursue criminal prosecution and increased penalties, including up to seven years imprisonment for major offenders (ref K). According to SDIP, in 2006 the GOU seized a total of 1.3 million items, up from 850,000 items in 2005, and destroyed a total of 90,000 items, down from 100,000 in 2005.

¶14. (U) The GOU set up an IPR Coordinating Council in 2003 to enhance interagency communication among the roughly eight government bodies responsible for IPR. Deputy Prime Minister Dmitriy Tabachnyk will now chair this IPR Coordination Council in an effort to give it more clout to address problem areas. SDIP is responsible for coordinating all IPR protection efforts, and in 2005 agreed to form an Enforcement Cooperation Group (ECG) jointly with the United States and with rights holders. The ECG met three times in 2006 and in February, 2007 (refs B, C, I, and J).

¶15. (U) SDIP has just one state inspector per oblast and must enlist the assistance of the Internal Affairs Ministry to file criminal cases. In its own Special 301 submission, SDIP recognized that enforcement at the local level, especially in regions not well covered by inspectors, is more difficult. SDIP also noted that local oblast governments often do not properly coordinate their

enforcement efforts.

¶16. (SBU) Lebid, head of the Ministry of Internal Affairs' IPR Department, complains that too many IPR cases result only in small fines, ranging from 1700-3400 UAH (340-680 USD). The courts often decide to penalize violators with "correctional works," usually paying 20 percent of one's salary for one to five years. In other cases, the courts decide on "imprisonment" but with delayed sentencing, similar to probation in the U.S. system. Lebid has argued that some of these rulings were not envisaged under the law, and were the result of the judges' own discretion. No one has yet served jail time for IPR crimes partly due to actions of the prosecutor general and judges, who often lack expertise on IPR issues and do not always take these crimes seriously. The Ministry of Internal Affairs had requested in 2006 that the Supreme Court hold a coordination session on IPR crimes to issue clearer instructions to the lower courts, but this session did not yet take place.

¶17. (U) January 1, 2004 amendments to the Customs Code empowered customs officers to impound illegal material at the border, but only if it was included in the "Register of Goods Containing Intellectual Property." Customs officials had also needed to refer impounded goods to the courts for an official determination as to whether they are counterfeit or not. A November 2006 amendment to the Customs Code, however, granted expanded "ex officio" powers, allowing customs officials to act on their own initiative without a right holder's claim or court decision. The State Customs Service Order No. 1061 of February 2005 authorized the establishment of special intellectual property rights subdivisions at ports of entry and inland customs points. The Customs Service reported that as of February 15, 2007, 30 of these subdivisions had been established at Ukrainian customs points.

Notorious Markets - Petrivka  
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¶18. (SBU) Kyiv's Petrivka Market, a massive open air market where as many as 300 stands may be selling illegal material at any given time, has become a symbol of piracy in Ukraine. Although Ukrainian law enforcement has pushed most of the smaller vendors off street corners, Petrivka remains a sanctuary for all kinds of illegal, pirated goods, including music, films, games, and software. In 2005, the GOU undertook "Operation Intellect," an enforcement action meant to drive the pirates out of Petrivka. The impact of Operation Intellect and subsequent enforcement actions has only been temporary, however. One barrier to enforcement, according to industry sources, is that the owners of pirate stalls are often influential businessmen with ties to local government. Law enforcement officials may be wary to undertake major operations against Petrivka without clear directives from the highest levels of the Government.

¶19. (U) Ministry of Internal Affairs officials nonetheless claim to be making headway. The Ministry's IPR Department formed an ad-hoc working group among Kyiv authorities in May 2006 to focus on Petrivka. During eight months of operation, this working group oversaw 320 IPR-related investigations, which resulted in 290 administrative penalties (usually fines) and 28 criminal cases, nine of which have already brought convictions. Police seized 100,000 units of pirated material; 40,000 were destroyed in September 2006, while the rest is scheduled for destruction in February. Iling noted that law enforcement bodies have achieved some limited success in persuading Petrivka Market management to revoke the licenses for stalls known to sell pirated material. Roudyk told Econoff on February 9 that the Internal Affairs Ministry believes these efforts are having a significant impact, reducing the number of pirated goods in Petrivka by half.

Internet Piracy



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¶20. (U) Internet piracy is a nascent problem in Ukraine. Many Ukraine-based websites offer pirated material for download with the full knowledge of their Internet Service Providers (ISPs). Industry groups estimate that out of the roughly 400 ISPs in Ukraine, 150 of them support websites offering pirated material. Microsoft Ukraine has complained that Local Area Networks (LAN), some of which cover entire Ukrainian cities, allow for widespread software piracy. Another common type of Internet piracy is on-line mail order sites.

¶21. (U) Ministry of Internal Affairs officials have pointed to some successes in stopping the mail order piracy, but admit that file sharing/downloading is much more difficult. GOU representatives have argued that Ukrainian law does not give law enforcement officials clear authority to shut down websites, although sometimes ISPs can be persuaded to do so. In order to go after the pirates involved, however, the GOU needs rights holders to file claims for damages. At a meeting of the IPR ECG on February 6, industry and SDIP agreed to begin jointly monitoring suspected pirate sites (ref B).

#### Training Needs

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¶22. (U) The GOU has demonstrated the political will to combat IPR violations, but does not always possess the technical competency required. To assist the GOU in its efforts, the Commercial Law Development Program (CLDP) has conducted a series of IPR-related seminars, Post has utilized USPTO's Global Intellectual Property Academy, and industry has chipped in to provide expertise. Post appreciates Washington's consideration for an enforcement-related training session in Ukraine, with translation for non-English speakers. Ukraine would especially benefit from training in the following two areas:

-- Judges/Prosecutors: Numerous industry reps, and even the Ministry of Internal Affairs, have repeatedly described the courts as the weakest link in enforcement efforts. In addition to systemic problems (i.e. corruption), judges and prosecutors often lack the required technical background on IPR issues.

-- Internet Piracy: Internet piracy is a growing problem, and the GOU admits that it lacks the technical competency to properly address it (ref B).

TAYLOR